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WHAT LAW GOVERNS THE VALIDITY OF A CONTRACT.

NO topic of the Conflict of Laws is more confused than that which deals with the law applying to the validity of contracts. More than one cause is responsible for this confusion. In the first place the problem itself has not been clearly thought out and distinguished from similar problems by lawyers and judges. In passing upon a contract it may be important to determine whether the agreement in question has ever come into existence as a binding contract, or what its nature is; it may be desired to determine whether the obligation has been performed, or what has been the effect of its performance or non-performance; and finally it may be in question whether a certain remedy can be had for its breach. It is obvious that a different law may be applicable to the creation of a contract from that applicable to its performance; and it is certainly the case that all questions involving the remedy are differently governed from questions involving the obligation and performance. Courts and writers, however, often lay down broadly, as a general rule, a principle which is meant to apply to one or the other of these cases and not to all. A striking example of this sort of confusion is found in Judge Story's treatment of the subject. At the outset he lays it down as a general principle that a contract is governed by the law of the place of making.[1] Later in his treatment of the topic he states that this general principle is confined to cases where contracts are made and to be per-

[1] § 242 (1 ed., 1834).

formed in the same place, and that where the place of performance differs from the place of making the rule is a different one.[1] This method of treating the subject would naturally lead to confusion; and indeed it has been responsible for a large proportion of the conflict of authority. Yet it is clear that in the first section he meant merely to point out that the law of the forum did not apply to the obligation of a contract made elsewhere, and that no question of place of performance was involved; while on the other hand, his second statement was applicable to a case where the place of making and performance were different, and no point was made of the place of suit. In other words, his first statement amounts to saying that the law of the forum does not apply to the right; his second, to saying that the law of the place of performance governs the validity. He however puts it as if by the general rule the law of the place of making governs, subject to an exception; and he did not expressly point out the fact that the rules he laid down were applicable to entirely distinct problems. As a result, the confusion of thought which has been mentioned has been accentuated by the citation of his authority on the one side or the other in cases to which his language ought not to be applied.

The confusion of the law, however, is only partly due to a lack of clearness in distinguishing between the different cases that may arise. Even where the point involved is clearly in mind, the decisions themselves are greatly confused. Several entirely distinct rules have been laid down for determining the validity of a contract, and each of these rules is supported by authority. If, in any particular jurisdiction, only one of these rules were adopted we should have the not uncommon case of a difference between jurisdictions on a point of of law. Unfortunately, however, many jurisdictions in the United States have been unusually hospitable to the different rules. We find irreconcilable principles laid down in the decisions of the same jurisdiction; and not infrequently several irreconcilable doctrines propounded in the same case as undoubted statements of general rules of law. It is in this respect that the confusion of authority on the point is unusual. Perhaps the most striking example of this conflict of authority is afforded by two cases in the Supreme Court of the United States: Scudder *v.* Union Bank[2] and Hall *v.* Cordell.[3] In the first case a parol acceptance had been given in Illinois for a bill drawn in

[1] § 280. [2] 91 U. S. 406 (1875). [3] 142 U. S. 116 (1891).

Illinois and payable in Missouri. In the second case an oral acceptance had been given in Missouri for a bill drawn in Missouri and payable in Illinois. By the law of Illinois an oral agreement to accept was binding; by the law of Missouri it was not. In the first case, the court held that the law of the place of making the contract must govern, and that therefore as the contract was made in Illinois it was a valid one. In the second case, the court held that the law of the place of performance must govern, and that therefore the law of Illinois the place of performance made the obligation valid. The court in the second case was not ignorant of the earlier decision, for it cited it as authority that the law of Illinois made such a parol acceptance valid; and yet the court apparently did not notice that its decision was directly opposed on the point of conflict of laws to that in the earlier case. It is not often, of course, that so glaring a contradiction is found in the cases of the same jurisdiction. The acceptance of two different and opposed principles on this point is usually made possible by the application of the principles in different classes of cases. It is not uncommon, for instance, for a court to lay down one principle in cases of commercial paper, and an entirely different principle in cases of contract of carriage, without noticing that in substance the same point is really involved in both classes of cases.

In order to avoid a confusion as to the subject of discussion, let us limit our consideration to cases where the question in doubt is the nature or the validity of a contractual obligation. Questions concerning performance are not here to be considered, and so far as possible the authorities cited will be cases in which the validity or nature of the obligation was in question; although it is not always possible to distinguish the cases, as the courts themselves have not usually made the distinction.

A distinction has been suggested between the form required for contracting and the substantial requirements for a binding contract; or to use Professor Dicey's phrase,[1] between the formal validity and the essential validity of a contract. This is a well-recognized distinction in the Civil Law of Europe. A difference might doubtless be made in our law between the form which an act must take and the effect of the act in creating a legal obligation; but as a matter of fact decisions in courts of common law have seldom turned on this difference. Without further considering this question I shall concern my-

[1] Dicey, Conf. Laws, 2 ed., pp. 540, 545.

self principally with the essential rather than the formal validity of the contract, and so far as it is possible to do so shall omit the authorities which deal merely with the question of formal validity. A distinction has also been made between the capacity of parties to contract and the binding obligation of their agreement. Here again I shall not consider questions of capacity except so far as the courts have made it impossible to distinguish.[1]

In dealing with this topic I propose to consider first the origin and history of the present doctrine, and second, the condition of authority in the various common-law jurisdictions. I shall then proceed to criticise the various doctrines; pointing out what, as it seems to me, is the true solution of the problem.

I.

The Origin and History of the Doctrine.

The first case in which the question was considered and the case which has furnished authority for all subsequent discussions, is the case of Robinson *v.* Bland.[2] This was an action of assumpsit in three counts: first, on a bill of exchange, drawn by the defendant's intestate upon himself in France and payable in England, and accepted by the intestate; second, money lent in France to the intestate; third, money had and received in France by the intestate to the use of the plaintiff. The plaintiff had lent to the intestate in Paris £300, which the intestate then and there lost to the plaintiff at play, together with £372 more; and the bill of exchange was given for the whole amount. It was found that "in France, money lost at play, between gentlemen, may be recovered as a debt of honor, before the marshals of France, who can enforce obedience to their sentences by imprisonment; though such money is not recoverable in the ordinary course of justice. That money lent to play with, or at the time and place of play, may be recovered there, as a debt, in the ordinary course of justice"; and that both the plaintiff and the intestate were gentlemen. The case was twice argued in the King's Bench, and was finally decided by a court consisting of Lord Mansfield, C. J., and

[1] It does not seem theoretically possible, on the principles of the common law, to support these distinctions; but that is another story.

[2] 2 Burr. 1077; 1 W. Bl. 234, 256 (1760).

Denison and Wilmot, JJ. The court held unanimously that the bill of exchange was void, and that the money lost at play could not be recovered; but that the money lent could be recovered. Two of the judges agreed upon a reason for their decision, viz., that the law of France and the law of England were identical on all these points.[1] The judges, however, all expressed their views on the question which law would prevail if the laws of France and of England were different. Mr. Justice Denison expressed the opinion that the English law would prevail, since the plaintiff had chosen England as his forum and must therefore be bound by the English law.[2] Mr. Justice Wilmot asserted that where recovery was against the policy of the forum there could be no recovery, and on this ground he should "incline" that the law of England should prevail, but he gave no opinion on that point; and he also mentioned, as a strong reason for recovery for money lent, the fact that it was payable in England. He placed his decision, however, on the ground that the laws were the same. Lord Mansfield, having pointed out that the laws were the same, and therefore no question arose as to which law should govern, added two reasons for applying the English law: "First, the parties had a view to the laws of England. The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed (citing Huberus and Voet). Now here, the payment is to be in England; it is an English security, and so intended by the parties." Second, the payment was to be in England, and "in every disposition or contract where the subject-matter relates locally to England the law of England must govern, and must have been intended to govern."

It will be seen that the three judges expressed four possible views

[1] Lord Mansfield: "The facts stated scarce leave room for any question; because the law of France and of England is the same." "As to the money won, the contract is to be considered as void by the law of France, as well as by the law of England; which makes it unnecessary to consider how far the law of France ought to be regarded." "As to the money lent, the plaintiff is entitled to it, both by the law of England and by the law of France." Wilmot, J.: "Whether an action can be supported in England, on a contract which is void by the law of England, but valid by the law of the country where the matter was transacted, is a great question (though I should have no great doubt about that). But that case does not exist here. . . . The laws of France and of England are the same, as to the money won." "As to the money lent: there can be no doubt; because there is no law either in England or France that hinders the plaintiff from maintaining his action on it." Denison, J., however expressed no opinion on this point.

[2] "The plaintiff has appealed to the laws of England by bringing his action here, and ought to be determined by them."

as to the law which should govern in case of difference: the law of the forum; the law of the place of performance; the law intended by the parties; the law of the place of performance as that presumably intended by the parties. If these are to be regarded as rules of law, they are mutually destructive; if either is the rule, the others cannot be. It will further be seen that these expressions of the judges are mere *dicta*, and that the majority of the court expressly pointed out that fact.

It will further be noticed that these expressions were uttered on the supposition that the contract was valid where made. The court was not suggesting that a contract void where made could be upheld on the ground that it was made with a view to another law by which it would be valid. And a few years later the same court held that a note made in Jamaica and payable in London could not be enforced in England if it was invalid by the law of the country where it was made.[1]

The *dicta* in Robinson *v.* Bland were not greatly considered in England for a hundred years after the decision; and most of the *dicta* had been rejected in well-considered cases. (1) The court refused to apply the law of the forum in Quarrier *v.* Colston.[2] (2) The court refused to apply the law of the place of the subject-matter of the contract in Stapleton *v.* Conway.[3] (3) The court refused to presume the intent of the parties to submit their contract to the law of the place of performance, and on the contrary asserted that they must be presumed to submit to the law of the place of making, in Peninsular and Oriental Steam Navigation Co. *v.* Shand.[4]

But Lord Mansfield's first reason for preferring the law of England — that it was the law intended by the parties — has never been repudiated by an English court, and has finally been accepted as the rule by which the validity of all contracts is to be decided.[5]

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[1] Alves *v.* Hodgson, 7 T. R. 241 (1797).

[2] 1 Phillips 147. Action to recover money lent in Germany to be used in gambling. Recovery allowed, as permitted by the German law, though not by the English law.

[3] 3 Atk. 727. Mortgage in England of a plantation in the West Indies; interest reserved at a rate invalid in England, but valid in the West Indies; mortgage held invalid.

[4] 3 Moo. P. C. N. S. 290, 12 L. T. Rep. 808. Ticket issued in England for carriage to Mauritius, exempting liability for loss of baggage. Law of England governs.

[5] *In re* Missouri S. S. Co., 42 Ch. D. 321; Hamlyn *v.* Talisker Distillery, [1894] A. C. 202; South African Breweries *v.* King, [1899] 2 Ch. 173, [1900] 1 Ch. 273; Spurrier *v.* La Cloche, [1902] A. C. 446. This doctrine has been fully adopted by Professor Dicey. Conf. Laws, 2 ed., p. 529.

Before investigating the history of this doctrine in the United States it will be well to consider whence Lord Mansfield derived it. There is very little doubt of its origin. The authorities which he cited for his *dictum* were two continental writers, Huberus and Voet. No earlier English case laying down such a rule was cited by him or has ever been found by a later commentator or judge. The doctrine itself is one that is quite foreign to common-law notions. That parties should be allowed to choose a law for themselves by which they should be governed is not a natural notion in a law based like ours on the complete jurisdiction of the territorial sovereign. The continental idea of the applicability of law, derived from the political system of the Roman empire, regarded a system of law as the peculiar property of the person entitled to it, which he had at any time a right to claim; but he might at any time in place of it accept another system. A Roman citizen anywhere in the world had a right to claim the protection of the Roman law, though he might if he chose waive that protection and act in obedience to a provincial or barbarian law, and this liberty of choice persisted to modern times. It is a prevailing doctrine on the continent of Europe that in the case of all voluntary obligations, parties, since they have the right to choose whether or not they will be bound, have also the right to choose the law under which they shall be bound. This doctrine, first clearly formulated by Dumoulin, is known as the principle of autonomy of the will.[1] After the first argument of Robinson *v.* Bland, the court found itself unable to decide the case, and ordered a reargument; and among other suggestions they directed that civil-law authority should be looked into in the hope that the doctrines therein adopted might throw light on the case, in the absence of common-law precedent.[2] In view of these facts there can be but one conclusion. The doctrine was adopted bodily from the continental writers, and is an anomaly in our own law, though quite consistent with the principles of the modern civil law.

Is it then permissible for us to base principles of the conflict of laws on civil-law authorities? It is submitted in general that this should not be done. It is true that certain doctrines of the conflict of laws, relating to the limits of jurisdiction, are of international origin, and that they should therefore be the same throughout the civilized world;

[1] A. Pillet, Principes de droit int. privé, chap. xv.

[2] See the report, 1 W. Bl. 234, 247.

a fact which is over-emphasized by the name *Private International Law*, often erroneously given to the subject. Apart however from questions of national jurisdiction there can be little doubt that the principles of the conflict of laws are in the fullest sense principles of the municipal law of each country. With us such questions are solved or should be solved entirely in accordance with common-law principles and analogies; and to follow the authority of writers on the modern civil law is as improper as it would be to accept from a continental writer the doctrine that a written contract requires no consideration. The practice introduced by Lord Mansfield, or at least in his time, of turning to civil-law authors and authority, and continued by several scholarly American lawyers during the first third of the nineteenth century was not one which has tended to preserve the correctness and the purity of the common law. It would have been better if Lord Mansfield had contented himself with a discussion of the case before him on the ground accepted by all the court, and had refrained from introducing into our law notions derived from an alien system of legal thought.

The authority of Lord Mansfield was powerful enough in America to secure the adoption of his *dictum* from the very start, and owing to the number of legally independent jurisdictions in this country the question came up more frequently than in England, and the doctrine became established by a considerable weight of authority long before it was firmly fixed in the mother country. The first writer to consider the question in an authoritative treatise was Kent, who laid down Lord Mansfield's rule with some little hesitation.[1] A few years later, however, Story accepted it in full. So important is his treatment of the subject in the history of our law that it seems worth while to give the substance of it in full:

"Generally speaking, the validity of a contract is to be decided by the law of the place where it is made. The same rule applies *vice versa*, to the invalidity of contracts; if void or illegal by the law of the place of the contract, they are generally held void and illegal everywhere. But there is an exception to the rule as to the universal validity of contracts, which is, that no nation is bound to recognize or enforce any contracts which are injurious to their own interests, or to those of their subjects." [2]

[1] 3 Com. 48 (1 ed., 1828).

[2] Conf. Laws, §§ 242, 243, 244.

"The ground of this doctrine, as commonly stated, is that every person, contracting in a place, is understood to submit himself to the law of the place, and silently to assent to its action upon his contract. . . . It would be more correct to say, that the law of the place of the contract acts upon it, independently of any volition of the parties, in virtue of the general sovereignty possessed by every nation to regulate all persons, property, and transactions within its own territory." [1]

"The law of the place of the contract is to govern as to the nature, obligation, and interpretation of it." [2]

"The rules already considered suppose that the performance of the contract is to be in the place where it is made either expressly or by tacit implication. But where the contract is either expressly or tacitly to be performed in any other place there the general rule is, in conformity to the presumed intention of the parties, that the contract as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance." [3]

Both Kent and Story cited a number of American cases in support of the doctrine they laid down. These cases had almost without exception adopted the intention of the parties as the test of the law of the contract. Thus, in Powers *v.* Lynch,[4] the Supreme Court of Massachusetts said, "Contracts are to be considered by the laws of the country where made . . . provided it does not appear from the nature of the contract, or from other facts, that in the contemplation of the parties, the performance of the contract has relation to the laws of another country." In New York the Supreme Court in Thompson *v.* Ketcham [5] said, "Where a contract is made in reference to another country, in which it is to be executed, it must be governed by the laws of the place where it is to have its effect." And a little later, in the same case [6] Chief Justice Kent said, "The *lex loci* is to govern, unless the parties had a view to a different place, *by the terms of the contract.*" In M'Candlish *v.* Cruger [7] the South Carolina Court said, "Whenever the contract is made with a view of its being performed in another country, then the law of the place where the performance is to be made should be the true rule." And in Pennsylvania, in Hazelhurst *v.* Kean,[8] the court said, "The

[1] Conf. Laws, § 261.
[2] *Ibid.*, § 263.
[3] *Ibid.*, § 280.
[4] 3 Mass. 79 (1807).
[5] 4 Johns. 285 (1809).
[6] 8 Johns. 189 (1811).
[7] 2 Bay 377 (1802).
[8] 4 Yeates 19 (1804).

parties must be supposed to have in contemplation the law of the place where the contract is made, and it necessarily forms a part of the contract."

Hardly a voice seems to have been raised in opposition to this doctrine until, in the year 1841, Chief Justice Shaw, in Carnegie *v.* Morrison,[1] reëxamined the question, and reached a conclusion that does credit to his illuminated common-sense. It is positive law, he said, concurring with and giving effect to the act of the parties which determines the nature and extent of a contract. "The law operating upon the act of the parties creates the duty, establishes the privity and implies the promise and obligation on which the action is founded." The general rule, therefore, is that the *lex loci contractus* determines the nature and legal quality of the act done; whether it constitutes a contract; the nature and validity, obligation and legal effect of such contract; and furnishes the rule of construction and interpretation. He admits an exception where the parties act in a place where there is no law; and points out that the *execution* of a contract must be according to the legal requirements of the place of execution. "So far as this transaction constituted a legal and binding contract at all, it was, we think, by force of the law of the place of contract operating upon the act of the parties, and giving it force as such. The undertaking, it is true, was to do certain acts in England, to wit, to accept and pay the plaintiff's bills; but the obligation to do those acts was created here, by force of the law of this state, giving force and effect to the undertaking of the defendant's agent, and making it a contract binding on them. Supposing the law of England had provided that no letter of credit should be issued, unless under seal, or stamped, or attested by two witnesses, or acknowledged before a notary, is it not clear that, as no such formalities are required by our laws, a letter of credit made here would be held good without such formalities? We think it would be so held even in England, under the authority of the general rule, that a contract, valid and binding at the place where made, is binding everywhere." [2]

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[1] 2 Met. 381 (1841).

[2] Judge Shaw adds, it is true: "there is no reference, tacit or express, in this instrument, to the laws of England, which can raise a presumption that the parties looked to them as furnishing the rule of law which should govern this contract. It was, therefore, in our opinion, in legal effect, a contract made in Massachusetts by parties, both of whom were here by their agents, or persons acting for their benefit and in their behalf, and therefore the nature, obligation, and effect of this contract must be governed

The influence of Judge Shaw and the power of his reasoning have been sufficient to gain considerable adherence since that time to the doctrine that a contract is governed by the law of the place of contracting. Still oftener the court relies on his reasoning to support the rule that the law of the place of making the contract governs unless there is some extraordinary provision which shows that another law was contemplated. But on the whole, as will be shown, the prevailing tendency of the American cases is to regard the intention of the parties as controlling; and this intention is often conclusively found to be in favor of the law of the place of performance.

It is purposed, in another article, to consider the actual condition of the authorities in England and in the various jurisdictions of our own country.

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[*To be continued.*]

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by the law of this Commonwealth." He thus seems to give a certain recognition to the power of parties by their own choice to make another law than that of the place of contract applicable to the obligation. But his whole line of reasoning, as well as the decision itself, leads directly to the conclusion that no other law than that of the place of making can apply to the validity or the nature of the obligation.